B. Adams's pleadings

44. RBI next assails Adams for filing what RBI characterizes as "patently meritless claims" in certain pleadings directed against RBI. RBI Motion at 27-30.

45. The first target of RBI's invective is Adams's First Motion to Enlarge which, according to RBI, was inadequately supported and contained mischaracterizations. Adams stands by the arguments and characterizations presented in that motion, all of which were amply supported and well within the bounds of permissible and legitimate advocacy. To the extent that RBI may disagree with Adams's arguments and characterizations, RBI has had full opportunity (in responsive pleadings) to bring those disagreements to the Presiding Judge's attention. Such disagreements are routine in the litigation process. The fact of such disagreements plainly does not support the unusual notion that, because parties disagree, one party can or should be deemed to be abusing the Commission's processes. [22/]

46. RBI's next two targets are Adams's Threshold Showing and its Second Motion to Enlarge. RBI claims that these two ignored certain decisions by the Commission and were therefore (according to RBI) filed solely for the purposes of character assassination and

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[21/](...continued)
to avoid any such delay, and Adams is hard-pressed to see how any delay could be attributed to this matter.

[22/] Under RBI's theory that "mischaracteriz[ations]" of reported cases reflect some abuse of process, RBI is guilty of precisely the same misconduct in its own Motion. As noted above, in characterizing the Commission's decision concerning the supposes public interest validity of home shopping programming, RBI conveniently failed to mention a portion of the Commission's decision in which the Commission made extremely clear that the mere provision of a home shopping format would ***not*** automatically be deemed to satisfy a renewal applicant's public interest obligations. *See* page 9, above. Similarly, in quoting the District of Columbia ethics commentary, RBI conveniently stopped quoting immediately before language which substantially, if not completely, undermined the point it was trying to make. *See* page 19, above.

harassment. RBI Motion at 29-30.

47. But Adams's Threshold Showing was submitted at the express invitation of the Presiding Judge. *See* Memorandum Opinion and Order, FCC 99M-47, released August 9, 1999, ¶9 and n. 9. As stated by the Presiding Judge, a threshold showing of unusually poor broadcast record should address a "failure to carry out representations to the Commission". *Id.*, quoting *Policy Statement on Comparative Broadcast Hearings*, 1 FCC2d 393 (1965). That is precisely what Adams's Threshold Showing sought to address, citing two reported cases in which RBI's dominant principal, Micheal Parker, had been found to have engaged in fraud or deceit before the Commission. Further, to the extent that the standard quoted by the Presiding Judge could be read to include other possible indicia of the unreliability of RBI (or Mr. Parker) -- and Adams believes that such a reading is clearly permissible -- Adams believed it appropriate to call the Presiding Judge's attention to the fact that RBI has associated itself with two other individuals (Eugene Scott and Thomas Root) whose respective records before the Commission speak for themselves.

48. Adams's Second Motion was similarly directed to the question of the reliability of Mr. Parker's (and, thus, RBI's) representations to the Commission. Adams made a prima facie demonstration that Mr. Parker had made false statements or misrepresentations to a bankruptcy court. While such misconduct would be fair game under any circumstance, it was particularly appropriate to raise it here because RBI itself has touted Mr. Parker's previous activities in bankruptcy proceedings as a positive attribute. Importantly, in responding to Adams's Second Motion, neither RBI nor Mr. Parker took the position that Mr. Parker had not in fact lied to the bankruptcy court. If the Commission's ability to rely

on the representations of an applicant is a significant element of the comparative process -- and Adams firmly believes that it is -- then Adams's Second Motion was clearly appropriate.

C. The alleged *ex parte* violation

49. RBI also claims that Adams has violated the *ex parte* rules by providing to the Presiding Judge a declaration of an Adams principal without serving copies of that declaration on the other parties. The declaration was provided to the Presiding Judge in a sealed envelope, with a separate transmittal letter describing the contents of that envelope. Copies of that separate transmittal letter were duly served on all parties so that they could be aware of what Adams was filing. Adams specifically advised the Presiding Judge that, if directed to do so, Adams would provide copies of the declaration (as well as the other materials so submitted) to RBI. The Presiding Judge reviewed the materials, declared them to be not relevant to any issue in this case, but instructed Adams to provide them to RBI just the same. Adams promptly did so.

50. Adams is at a loss to perceive any *ex parte* violation here. Adams did not attempt to contact the Presiding Judge surreptitiously, without notice to all other parties. To the contrary, Adams provided all parties, and the Presiding Judge, with explicit notice of what it was doing. And even if some hypertechnical violation could be deemed, *arguendo*, to have occurred, any such violation was easily and promptly cured when, pursuant to the Presiding Judge's instruction, Adams provided copies of the materials to RBI -- exactly as Adams had said it would. RBI's claim of *ex parte* violation is yet another instance of RBI's unsuccessful alchemic efforts to turn nothing into something.

III. Conclusion

51. RBI's voluminous motion is full of sound and fury, but it ultimately signifies nothing. Based solely on wishful thinking and myopic, self-serving claims, RBI's arguments provide no basis at all for addition of any issues in this proceeding, and even less basis for dismissal of Adams's application. RBI's Motion must be denied. If it is denied, then no further consideration need be given to RBI's bizarre (and obviously self-motivated) suggestion that this proceeding be stopped in its tracks. *See* RBI Motion at 32-33. [23/]

Respectfully submitted,

/s/ Gene A. Bechtel
Gene A. Bechtel

/s/ Harry F. Cole
Harry F. Cole

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Counsel for Adams Communications Corporation

November 22, 1999

[23/] In the final footnote of its Motion, RBI suggests that "the conduct of Adams and its counsel" be referred to the Office of General Counsel. Neither Adams nor its counsel has any objection to any such referral. In fact, Adams and its counsel intend to provide the General Counsel with copies of RBI's Motion and Adams's Opposition. Adams's goal is to expedite any review which the General Counsel may deem appropriate. Adams and its counsel are confident that they have at all times acted properly, and they are offended at RBI's contrary accusations. Since RBI apparently believes that the General Counsel is the agency authority empowered to consider and resolve such matters, Adams and its counsel intend to seek such resolution at the earliest possible time.

ATTACHMENT A

Declaration of Howard N. Gilbert
(with accompanying copy of "Newspaper-Radio
Joint Ownership: Unblest Be The Tie That Binds",
59 Yale L.J. 1342 (1950))

DECLARATION

Howard N. Gilbert, under penalty of perjury, hereby declares the following to be true and correct:

1. I am a shareholder, officer and director of Adams Communications Corporation ("Adams"), an applicant for a new television station to operate on Channel 51 in Reading, Pennsylvania. I am preparing this Declaration for submission to Presiding Judge Richard L. Sippel in connection with Adams's Opposition to Motion to Dismiss or, in the alternative, to Enlarge the Issues filed against Adams by Reading Broadcasting, Inc. ("RBI").

2. In 1982, Monroe Communications Corporation ("Monroe") filed an application for a new television station on Channel 44 in Chicago. I and several other Adams principals were also principals of Monroe. At that time, Channel 44 was being utilized by a licensee providing "subscription television" ("STV") which was accessible to viewers only if they paid a subscription fee. The station's programming included, among other things, explicitly sexual content; the station's programming did not include any locally-oriented, locally-produced programming. The purpose of the Monroe application was to challenge the use of Channel 44 (a) as an STV station, airing sexually-related programming and (b) for failing to provide service to the local audience.

3. Monroe's principals were (and remain) very substantial businesspersons and community leaders. Three of Monroe's principals were founders or chief executive officers of three large corporations whose stock is (or in the case of Shelby-Williams, was until very recently) publicly traded on the New York Stock Exchange (Alberto-Culver, J. Walter Thompson, Shelby-Williams); a fourth is the chief executive officer of a substantial privately-held corporation. I am a

partner in a Chicago law firm. In forming Monroe, we were motivated by a common concern about the failure of Channel 44 to serve the public interest. Monroe proposed to provide free, over-the-air Spanish language programming.

4. My own personal interest in the public interest aspect of broadcast licensing extends over half a century. While a law student at Yale Law School in 1950, I wrote an article for the Yale Law Journal concerning that subject. A copy of that article ("Newspaper-Radio Joint Ownership: Unblest be the Tie that Binds", 59 Yale L.J. 1342 (1950)) is attached to this Declaration.

5. In 1990, after extensive litigation lasting over almost a decade (including at least two decisions by the U.S. Court of Appeals for the District of Columbia Circuit), the Monroe application was granted. The incumbent renewal applicant sought reconsideration and, when that effort was rejected, filed an appeal. Despite the fact that the grant of Monroe's application was not final, Monroe proceeded to make final arrangements for a transmitter site atop the John Hancock Building in Chicago and engaged in substantive discussions with the only two Spanish-language programming networks then in operation so that Monroe could implement its nearly-decade-long proposal to provide free, over-the-air Spanish language programming to Chicago. However, after extensive discussions with one of those two networks, that network underwent an ownership change in connection with which the network unilaterally ceased its negotiations with Monroe. Monroe learned that the second Spanish network was at that time on the verge of bankruptcy and, in fact, it did go into bankruptcy shortly thereafter.

6. As a result of these developments, Monroe became legitimately concerned about its ability to realize its proposed

Spanish-language station. At that same time, Monroe was approached by the incumbent renewal applicant, which offered Monroe a substantial settlement. I emphasize that Monroe was approached by the incumbent. At no time during the course of 10 years of litigation did Monroe initiate any settlement discussions. Particularly in view of the doubtful availability of Spanish-language programming, Monroe reluctantly accepted that settlement offer.

7. Adams was formed in late 1993 for the purpose of challenging the renewal of television stations airing home shopping programming which was not serving any local interest. I was personally familiar with home shopping programming and believed that it suffered the same fundamental public interest flaws as did STV programming. When Adams was formed, I and the other Adams shareholders were aware that the rules of the Federal Communications Commission ("FCC") governing settlements had been changed since the filing of the Monroe application. In particular, I was specifically aware that the new rules (which had been in place since 1989) precluded any payment at all for settlement prior to conclusion of a hearing, and they precluded any for-profit settlement at any time. I knew that those 1989 rules would be applicable to any application Adams might file. That, however, was immaterial to Adams, as Adams intended to prosecute its application through to a successful conclusion, i.e., a grant, and had no intention of entering into any settlement arrangement. Adams's principals never discussed possible settlement because Adams did not contemplate seeking, or entering into, any settlement.

8. As an attorney, I am well aware that an agency's rules or policies may normally be waived or modified upon a showing of good cause. Adams has never sought, or contemplated seeking, any waiver or modification of the FCC's rules on settlement.

9. I am also aware that, on at least one occasion in 1995, the FCC did afford pending applicants an opportunity to settle on a for-profit basis. Since Adams is not interested in any settlement, Adams did not attempt to take advantage of any such opportunity. In fact, Adams has never approached RBI -- or anyone else -- seeking to settle this case, nor does Adams have any intention of doing so. While Adams has never sought any settlement, RBI has offered to pay Adams to dismiss the Adams application. In keeping with its unwillingness to enter into any settlement, Adams summarily rejected RBI's offer.

10. In late 1993 or early 1994, Adams ascertained that Station WTVE(TV), Reading, Pennsylvania, was providing full-time home shopping programming and had been so doing for a period of years. I was aware that the FCC had been instructed by Congress to determine whether home shopping stations should be accorded "must-carry" status on cable television systems and that, in 1993, the FCC had determined that such stations should be accorded "must-carry" status. However, I was also aware that that determination did not relieve home shopping stations of their obligation, as broadcasters subject to the Communications Act of 1934, as amended, to serve the local public interest.

11. In this connection, Adams's concern about home shopping was directly analogous to Monroe's concern about STV programming. Both types of programming had been "approved" in one way or another by the FCC, but such approval did not mean, per se, that stations broadcasting such programming were automatically and invariably serving their local audience's public interest. In the Monroe case we had demonstrated that a STV station had failed to serve the public interest so as to warrant a renewal expectancy. I believe that the Monroe case had a positive impact on the television broadcast industry

as a whole, sensitizing it to the need to pay greater attention to the needs and interests of local audiences. I believed (and continue to believe) that Adams will be able to make an equivalent demonstration with respect to Station WTVE(TV), based on its reliance on full-time home shopping programming.

12. To confirm this belief on behalf of Adams, I retained a number of individuals under the direction of a single individual to videotape, prior to the filing of Adams's application, the programming of Station WTVE(TV) for two weeks, 24 hours per day, seven days per week. As that taping project was on-going, I spoke regularly with the person who was in charge of making the tapes, and I was regularly briefed on the contents of the programming being taped. The information which I obtained through those reports strongly confirmed my belief that the station was not serving the public.

13. Through a misunderstanding with the person in charge of the videotaping, the programming which was actually taped was that of the home shopping cable channel, as opposed to the over-the-air signal of Station WTVE(TV). I did not become aware of that fact, however, until September, 1999, several months after the Adams hearing commenced. At the time Adams filed its application I believed that I had a reasonably detailed knowledge of the station's programming based in part on the reports I had obtained through the videotaping project. While the cable channel programming may have been distinct in certain respects from the station's, review of the station's programming records in connection with the Adams hearing supports my conclusions about the station's programming prior to the filing of Adams's application.

14. I have read the Declaration of Milton Podolsky, which is being submitted to Judge Sippel simultaneously with my Declaration. I

confirm that my recollection of the events and conversations relative to Mr. Podolsky's deposition is consistent with Mr. Podolsky's recollection as set out in his Declaration.

Howard N. Gilbert

Date: Nov. 22, 1999

NOTES

NEWSPAPER-RADIO JOINT OWNERSHIP: UNBLEST BE THE TIE THAT BINDS*

COMMON ownership of two or more sources of mass information [1] has been accelerating in recent years through acquisitions by newspapers of local radio stations.[2] This development is particularly disturbing since over-all competition in the distribution of news and opinion has been suffering from creeping atrophy.

Contemporary surveys indicate that of the 1394 communities with daily

* Mansfield Journal v. FCC, 180 F.2d 28 (D.C. Cir. 1950).

1. The owner of a news distributing medium places the imprint of his predispositions upon the news by virtue of his selection of the news events to be featured and the manner of their presentation. By extending his control to other media, he extends the scope of a single partisan selection, thereby excluding other, different ideas from the arena of public opinion. See Judge Learned Hand in United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, Associated Press v. United States, 326 U.S. 1 (1945).

Consequently, the FCC position in the *Mayflower* case, 8 F.C.C. 333 (1941)—the broadcaster must be impartial in his overall presentation of public issues—is extremely difficult to carry out. See YOUR NEWSPAPER 25 (Swirsky ed. 1947). That this is recognized by the FCC may be inferred from its attempts to allocate broadcast licenses to different persons within a community. See, *e.g.*, Easton Publishing Co., 4 PIKE & FISCHER RADIO REG. 176 (1948) *rev'd and remanded on other grounds*, 175 F.2d 344 (1949); James A. Noe, 3 PIKE & FISCHER RADIO REG. 1821 (1949). *Cf.* Midland Broadcasting Co., 3 PIKE & FISCHER RADIO REG. 1961 (1948). For a discussion of present patterns of broadcaster evasion of the unreal "fairness" formula of the *Mayflower* doctrine, see Note, *The Mayflower Doctrine Scuttled*, 59 YALE L.J. 759, 767 (1950); Note, *Radio Editorials and the Mayflower Doctrine*, 48 COL. L. REV. 785, 792 (1948).

While the Commission on the Freedom of the Press felt that diversity of outlook was important, it thought diversity did not necessarily depend upon facts of ownership. Nevertheless, in one situation—cross-channel ownership within a community—the Commission concluded that diversity would be seriously curtailed. CHAFEE, 2 GOVERNMENT AND MASS COMMUNICATIONS 623, 655 (1947). See also the testimony before the Press Commission of the Nieman Fellows, *id.* at 520; Fly, *Freedom of Speech and the Press*, in SAFEGUARDING CIVIL LIBERTIES TODAY 61, 68 (Sabine ed. 1945). The newspaper industry's leading spokesman has concurred with this position. Editor & Publisher, Dec. 31, 1938, p. 20. This problem was explored during the newspaper-radio investigation conducted during 1941–42. See Hearings before the FCC *in re:* Orders 79 and 79-A, Docket 6051, Exs. 397-9, 416-18.

2. The problem has been important for some time. See Shapiro, *The Press, the Radio and the Law*, 6 AIR L. REV. 128, 153 (1935). In 1934, many independent station owners feared that the entire industry might be taken over by the newspaper industry. Newsweek, June 16, 1934, p. 28. By 1937, the FCC was seriously concerned. Opinion of FCC General Counsel Gary, February 13, 1937 reported in WARNER, RADIO AND TELEVISION LAW 207 n.3 (1948). Four years later, the Commission began a full scale investigation. See note 26 *infra*. For a study of the increase in newspaper-owned stations, see notes 8 and 9 *infra*.

newspapers,[3] only 117 have two or more competing.[4] And except for the nation's twenty-four largest cities, there has been a tendency to eliminate competition completely.[5] A compensating trend in radio has failed to develop—out of 1300 cities with radio stations, only 30 per cent have competing outlets.[6] Viewing both media together, more than seventy per cent of the

3. The census defines a community as an incorporated place with a population of 2500 or more. Each community, whether or not it comprises part of a metropolitan area, is treated as an entity. There were 3,459 communities in the United States in 1940. *XVIth Census of the United States—1940*, 1 POPULATION 25 (1942). Since then, 67 new communities have come into existence. Communication to the YALE LAW JOURNAL from T. J. Slowie, Secretary, FCC, dated December 7, 1949, in Yale Law Library.

These communities have 1770 newspapers. Nixon, *The Problem of Newspaper Monopoly* in MASS COMMUNICATIONS 158 (Schramm ed. 1949). Today, there are 830 less newspapers in the United States than in the peak year of 1909 when 2600 were published. Although the number of cities with newspapers has increased since that time, the ratio between newspapers and communities has steadily decreased. It was 3.4 in 1910; 2.6 in 1920; and 1.7 in 1930. LEE, THE DAILY NEWSPAPER IN AMERICA 65–6 (1937).

4. Another 174 cities have two or more newspapers, either jointly owned or managed in such a way as to potentially eliminate competition. Of these, 161 are single owner cities. In the other 13, the two existing dailies have entered into partial combinations which place their business offices on a non-competitive basis. Nixon, *Concentration and Absenteeism in Newspaper Ownership*, 22 JOURNALISM QUARTERLY 97, 101 (1945).

There are only 1300 newspaper owners. And 91.6 per cent of the 1394 daily newspaper cities had a single publisher. Nonetheless, 58.8 per cent of the total circulation is competitive, for most of the daily circulation is in the larger communities where competition still exists and probably will continue to thrive. Nixon, *The Problem of Newspaper Monopoly* in MASS COMMUNICATIONS 158 (Schramm ed. 1949).

5. This trend works to eliminate all but one newspaper in towns of less than 50,000 population, to combine two papers under one publisher in cities of 50,000 to 400,000 and to maintain competition only in cities of more than 400,000 population. *Ibid.*

The distribution of daily newspaper competition by cities as of January 1, 1948 was:

Size of City	*Total Cities With Dailies*	*Competitive Cities*	*Percentage Competitive*
Less than 10,000	547	14	2.6
10,000–50,000	656	37	5.6
50,000–100,000	94	15	16.0
100,000–200,000	51	20	39.2
200,000–300,000	17	6	35.2
300,000–400,000	12	8	66.7
400,000 or over	17	17	100.0

Communication to the YALE LAW JOURNAL from Prof. R. B. Nixon, Professor of Journalism, Emory University, dated December 4, 1949, in Yale Law Library.

6. In 1949, 378 of the 1,311 communities possessing broadcasting facilities had competing stations. Communication to the YALE LAW JOURNAL from T. J. Slowie, Secretary, FCC, dated December 7, 1949 in Yale Law Library. These communities had 2,179 standard (AM) stations and 865 frequency modulation (FM) stations. The overwhelming majority of commercial FM stations were authorized to AM licensees and were jointly operated, so that programs broadcast over the AM stations were transmitted simultaneously by the FM station. 15 FCC ANN. REP. 40, 53 (1950).

In 1948, 356 communities had competing stations. Of these, 156 had two stations, 87 had three and 133 had four or more. *In the Matter of Editorializing By Broadcast Licensees*, OFFICIAL REPORT OF THE PROCEEDINGS BEFORE THE FEDERAL COMMUNICATIONS COMMISSION Docket No. 8516, Exhibit 26 (1948).

communities with dailies also have at least one radio station.[7] But 407 of the radio stations are affiliated with local newspapers,[8] and there are 170 "one-to-one" cities where the only radio station is affiliated with the only newspaper.[9] With such a limited number of mass media, these markets bear scant resemblance to the ideal of "the widest possible dissemination of information from diverse and antagonistic sources" within a community.[10]

Application of the antitrust laws by the Department of Justice is one possible remedy for the restrictions imposed by cross-channel ownership.[11] Antitrust law would compel divestiture if absorption of a radio station was

7. At least one newspaper and one radio station exist in 989 communities. Data compiled from BROADCASTING MAGAZINE YEARBOOK 69–325 (1950) and AYER & SON'S DIRECTORY OF NEWSPAPERS AND PERIODICALS 1165–88 (1950).

8. The figures for previous years are as follows:

Year	*Affiliated Stations*	*Total Stations*	*Per cent Affiliated*
1931	55	612	9.0
1935	104	605	17.2
1939	184	764	24.1
1941	211	801	26.4

Based on statistics presented in Hearings before the FCC *in re:* Orders 79 and 79-A, Docket No. 6051, EXS. 1, 3.

9. This represents a substantial increase over the number of local communications monopolies existing in 1941. At that time, 351 of the 801 stations were located in "one-to-one" comunities. In 111 of these, the only radio station was owned by the local newspaper, and in three cities the only two radio stations were owned by the only local newspaper. Hearings before the FCC in re: Orders 79 and 79-A, Docket No. 6051, Ex. 8, Table Ia. Today, 623 of the 1,311 cities have only one radio station and one newspaper; in 170 of these cities, they are jointly owned. In 75 other communities, the single newspaper owns one of the two radio stations. Statistics on the contemporary situation are compiled from BROADCASTING MAGAZINE YEARBOOK 521–26 (1950) and AYER & SON'S DIRECTORY OF NEWSPAPERS AND PERIODICALS 1165–88 (1950).

10. Associated Press v. United States, 326 U.S. 1, 20 (1945).

It has been said that the paucity of local media is overcome by the number of available outside media: stations located in nearby towns; regional and clear-channel stations; and newspapers. But these media do not fulfil the same function as local media. Since each community has peculiar local problems which are of little concern to outside media, there must be diversification on the local level just as there must be diversity on the regional and national level. See dissent in Stephen R. Rintoul, 3 PIKE & FISCHER RADIO REG. 96, 99 (1945) (Commission approved transfer of only local radio station to only local daily where the community was serviced by a number of media originating in an out-of-state metropolitan area). See also Editor & Publisher, Dec. 31, 1938, p. 20. *Cf.* Plains Radio Broadcasting Co. v. FCC, 175 F.2d 359 (D.C. Cir. 1949). The Commission has taken this factor into account. See Communications Act of 1934 § 307(b), 48 STAT. 1083 (1934), as amended, 50 STAT. 189 (1937), 47 U.S.C. § 307(b) (1946) (hereinafter cited as the Communications Act), which was controlling in Samuel R. Sague, 3 PIKE & FISCHER RADIO REG. 694 (1947). *Accord,* Huntington Broadcasting Co., 5 PIKE & FISCHER RADIO REG. 721 (1950).

11. The Communications Act specifically provides that the granting of a license shall not estop the United States from proceeding against the licensee for violation of the antitrust laws. Communications Act § 311.

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the result of coercive tactics on the part of a newspaper, or if joint ownership was used to exclude disfavored advertisers or to sell them time and space only at unduly high rates.[12] Generally speaking, divestiture is also in order where joint ownership carries with it the power to exclude actual or potential competitors, or where its dominance is such as to deprive consumers of any real alternatives.[13] But it is at least doubtful that mere common ownership of a radio station and newspaper in a single town would violate the antitrust laws.[14] It is even more doubtful that common ownership of two out of three or four media would constitute a violation, even though the public interest in diversity of news sources is to a considerable extent compromised.

Practical considerations also weigh heavily against undue reliance on this means of enforcement. The funds available to the Antitrust Division are likely to remain meagre in relation to the job assigned to it.[15] Except where

12. United States v. Crescent Amusement Co., 323 U.S. 173, 189 (1944); Schine Chain Theatres v. United States, 334 U.S. 110, 128 (1948).

13. See United States v. Paramount Pictures, 334 U.S. 131 (1948) (monopoly power, whether lawfully acquired or not, may violate Section 2 of the Sherman Act); United States v. Griffith, 334 U.S. 100 (1948) (monopoly even though no showing of intent to establish a monopoly where the monopoly results as a consequence of buying power); Rostow, *Monopoly under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745 (1949).

Hence, the data prepared by the Office of Radio Research to indicate that there was very little difference between associated and non-associated stations in the number of news programs, their distribution through the day or in general program structure may be irrelevant. Hearings before the FCC *in re:* Orders 79 and 79-A, Docket No. 6051, Exs. 385-7. But see note 14 *infra*.

14. The Supreme Court has defined the area of the market wherein control is alleged as the zone of immediate competition for the product. See Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948) (market for sugar beets in a small area in northern California); United States v. Columbia Steel Co., 334 U.S. 495 (1948) (market for rolled steel in an eleven-state area); United States v. Yellow Cab Co., 332 U.S. 218 (1947) (taxi-cab market in Chicago).

It might be argued that in the communication field the product is local news and the market is the community. But compare the following statement: "Anyone who owns and operates the single theater in a town, or acquires the exclusive right to exhibit a film, has a monopoly in the popular sense. But he usually does not violate § 2 of the Sherman Act unless he has acquired or maintained his strategic position, or sought to expand his monopoly, or expanded it by means of those restraints of trade which are cognizable under § 1." United States v. Griffith, 334 U.S. 100, 106 (1948).

15. The Antitrust Division of the Department of Justice has never been equal to the task of policing the entire economy. Before 1939, its staff never included more than 60 lawyers; today, it has no more than 200. And not until 1940 did it ever receive an appropriation of $1,000,000. Limitations of personnel alone have made it impossible to continue beyond the investigation stage every inquiry disclosing practices which are questionable under the federal antitrust laws. A careful process of selection forces the Division to consider the advantage that will be secured if the action is successful and the effect of such action on future antitrust law enforcement. See WALTON HAMILTON, PATTERNS OF COMPETITION 59 (1940); Berge, *Some Problems in the Enforcement of Antitrust Law*, 38 MICH. L. REV. 462, 475 (1940); Fowler Hamilton, *The Selection of Cases for Major Investigation*, 7 LAW & CONTEMPORARY PROBLEMS 95, 96 (1940).

national monopoly is involved, the Division necessarily tends to tackle only selected offenders rather than an entire industry.[16] It would be virtually impossible to effect a uniform policy on cross-channel ownership by such procedures. Moreover, it seems undesirable to divert the energies of the Antitrust Division from the vast unregulated areas of the economy into a field already subject to supervision by another federal administrative agency.

Administration action by the Federal Communications Commission, therefore, is a more promising answer to the problems presented by newspaper-radio mergers. The FCC is empowered to grant, renew or revoke broadcasting licenses.[17] In exercising that power, it is confined by a statutory guide no less broad than the "public interest." [18] And ever since the

16. See, for example, the Antitrust Division's pattern of attack on the movie industry. It moved against all major producers and distributors, United States v. Paramount Pictures, 334 U.S. 131 (1948), but only against selected chain exhibitors. No attempt has been made to deal with the problem of local monopolies. But see the civil antitrust suit instituted against the Lorain Journal Co. in the United States Court for the Northern District of Ohio. United States v. Lorain Journal Co., Civil Action No. 26823 (filed September 22, 1949) (attempt to monopolize the sale of mass advertising in the Lorain-Elyria area).

17. Communications Act §§ 307, 309(a), 312(a). The FCC can exercise broad discretion in determining whether grant of a license will be in the public interest. See, *e.g.*, FCC v. WOKO, 329 U.S. 223 (1946). The Commission can engage in widespread investigations to secure the necessary information for a proper discharge of its functions. Stahlman v. FCC, 126 F.2d 124, 127 (D.C. Cir. 1942); FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 54 (1946). Renewal applications are to be governed by the same considerations as applications for new licenses. Communications Act § 307(d). The grant of a license to a broadcaster gives him no property right in the allocated channel. See Trinity Methodist Church v. FRC, 62 F.2d 850, 853 (D.C. Cir. 1932); Yankee Network v. FCC, 107 F.2d 212, 215 (D.C. Cir. 1939). While this power cannot be exercised without reason, the Commission can refuse to extend the franchise when the operation of the station is not in the public interest. Evangelical Lutheran Synod of Missouri v. FCC, 105 F.2d 793, 795 (1939).

Renewal proceedings furnish the FCC with an opportunity to submit the licensee's operation of the station to a comprehensive evaluation. In the case of AM stations, this opportunity occurs once every three years. 47 CODE FED. REGS. § 3.34 (1949). FM licenses are granted for a lesser period. *Id.*, § 3.218. While the Commission can terminate the franchise at any time during its life, it has been chary in the use of this power, having utilized it only twice in 23 years. Station WSAL, 8 FCC 34 (1940); Station KPAB, 5 PIKE & FISCHER RADIO REG. 1297 (1950). See Note, 15 GEO. WASH. L. REV. 425, 429 (1940). The major difference between denial and revocation proceedings lies in the placing of the burden of proof that station operation will be in the public interest. In the latter, unlike refusals to renew, the Commission must show that operation is not in the public interest. See WARNER, RADIO AND TELEVISION LAW § 12(g), (1948).

18. Communications Act §§ 151, 301. See Yankee Network v. FCC, 107 F.2d 212, 222 (D.C. Cir. 1939). See also SEN. REP. No. 772, 69th Cong., 1st Sess. (1926) (statement of the objectives of the Radio Act of 1927, precursor of the present act). Congress imposed upon the Commission the duty of protecting the public interest in the use of the common property—the broadcast channels. Communications Act § 301.

Abandonment of the principle of restraining government action in matters involving the press resulted from the singular nature of the broadcasting medium. Only in radio is the number of available channels subject to physical limitation. Even today, despite the three-

National Broadcasting Company case,[19] the term "public interest" has included the policies of the antitrust laws.[20]

In a recent case, *Mansfield Journal v. FCC*,[21] the Commission has for the first time denied a broadcasting license to a newspaper on antitrust grounds. Upon investigation and hearing, the Commission found that the Journal, Mansfield's only newspaper, had sought to suppress competition in the dissemination of news and to achieve an advertising monopoly by attempting to drive out the only other local mass medium—radio station WMAN. Because these past practices presaged future abuse, the Journal's application was denied.[22] On appeal, the Court of Appeals for the District of Columbia approved both the ruling and the grounds on which the ruling was made.[23]

But more important, the court indicated that the Commission in the exercise of its licensing power could look to a much broader range of considerations than the unseemly behavior apparently indulged in by the applicant in the *Mansfield* case. The decision not only implied that a license

fold increase in commercial broadcasting stations since 1945, the number of qualified applicants exceeds the number of available franchises. 15 FCC ANN. REP. 36 (1950).

19. National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

20. "A licensee charged with practices in contravention of this standard cannot continue to hold his license merely because his conduct is also in violation of the antitrust laws and he has not yet been proceeded against and convicted. By clarifying in Section 311 the scope of the Commission's authority in dealing with persons convicted of violating the antitrust laws, Congress can hardly be deemed to have limited the concept of 'public interest' so as to exclude all considerations relating to monopoly and unreasonable restraints upon commerce. Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the public interest merely because its misconduct happened to be an unconvicted violation of the antitrust laws." National Broadcasting Co. v. United States, 319 U.S. 190, 223 (1943).

Earlier, the Commission, relying upon Section 313, had said: "The prohibitions of the Sherman Act apply to broadcasting. This Commission, although not charged with the duty of enforcing that law should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve." FCC, REPORT ON CHAIN BROADCASTING 46 (1941). The FCC has also taken official notice of the policies of the Sherman Act when regulating the telephone and telegraph industries under the grant of power contained in Section 151 of the Act. See, *e.g.*, Western Union Division v. United States, 87 F. Supp. 324, 334 (D.C. Cir. 1949), *aff'd per curiam*, 338 U.S. 864 (1950). See also McLean Trucking Co. v. United States, 321 U.S. 67 (1944); New York Central Securities Corp. v. United States, 287 U.S. 12 (1932).

21. Mansfield Journal Co., 3 PIKE & FISCHER RADIO REG. 2014 (1948), *sub nom.*, Mansfield Journal v. FCC, 180 F.2d 28 (D.C. Cir. 1950).

22. The components of the Commission's decision are inextricably entangled. The Commission referred to its determination that diversification of the control of mass media was desirable; applicant's past record; and the possibility that applicant would extend his present course of action into the future if the application were granted. Whether the decision that the grant would not be in the public interest rests on the past practices or applicant's probable future operation of the station is not clearly stated. Most probably, it rests on both.

23. Mansfield Journal v. FCC, 180 F.2d 28 (D.C. Cir. 1950).

could be denied if the grant would help achieve a monopoly;[24] it also sustained the Commission's power to consider monopolistic practices of the applicant whether or not they would constitute violations of the antitrust laws.[25] It seems probable, therefore, that where appropriate the Commission can deny or revoke a license on a showing, without more, that common ownership will operate or has operated to reduce the diversity of news sources which "public interest" requires.

So far, the power has not become a practice,[26] though in recent competitive hearings the FCC has favored non-newspaper applicants.[27] Rather, analysis of cases since the *Stamford* decision[28] of 1945 indicates that the Commission's primary considerations in licensing are the degree of identification of the applicant with the community to be served; the probability that those in control will devote their full efforts to the station; the extent of previous experience in radio, particularly within the community involved; and the scope of the proposed service.[29] Apparently the issue of joint ownership is controlling only when scrutiny of these factors has failed to produce a decision.[30]

Since its power to incorporate the spirit as well as the letter of antitrust law into its regulation is now firmly established, the Commission should turn the *Mansfield* approach into a continuing policy. Wise administration might call initially for a rule which would in substance forbid newspaper ownership of radio stations where the effect would be to create a monopoly or substantially to lessen competition in the mass dissemination of news.[31]

24. *Id.* at 33, 34. The court cites with approval that section of the Chain Broadcasting Report which asserts the power of the Commission "to refuse licenses or renewals to any person who engages or *proposes to engage* in practices which will prevent either himself or other licensees from making the fullest use of radio facilities." (emphasis added). FCC, REPORT ON CHAIN BROADCASTING 83 (1941).

25. 180 F.2d. 28, 34 (D.C. Cir. 1950).

26. The Commission has granted newspaper applicants both standard and FM licenses in non-competitive hearings. See WARNER, RADIO AND TELEVISION LAW § 22(g). It has also granted franchises to newspapers in competitive hearings. Hamden-Hampshire Co., 3 PIKE & FISCHER RADIO REG. 504 (1949); Town Talk Broadcasting Co., 3 PIKE & FISCHER RADIO REG. 769 (1947); Orlando Daily Newspapers, 3 PIKE & FISCHER RADIO REG. 624 (1946). *Cf.* Midland Broadcasting Co., 3 PIKE & FISCHER RADIO REG. 1961 (1948).

There have been no attempts at dissolution for this cause since the investigation of newspaper ownership began in 1941. For the inconclusive statement of policy issued after the conclusion of the hearings, see 9 FED. REG. 702 (1944). See also BRUCKER, FREEDOM OF INFORMATION 83 (1949).

27. See, *e.g.*, Fairfield Broadcasting Co., PIKE & FISCHER RADIO REG. 190 (1949); Southern Tier Radio Service, 3 PIKE & FISCHER RADIO REG. 211 (1946).

28. Stephen R. Rintoul, 3 PIKE & FISCHER RADIO REG. 96 (1945).

29. See cases cited in notes 26 and 28 *supra*.

30. See WARNER, RADIO AND TELEVISION LAW § 22(g) n.13 (1948).

31. The Commission's powers are to be utilized to further "the public interest." Communications Act, § 303 (g). The courts have upheld the grant of broad discretion to the FCC to determine the most effective means of promoting this standard. See Ward v. FCC, 108 F.2d 486, 491 (D.C. Cir. 1939). The value of enacting rules to articulate the standard

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The rule would serve principally as a mere statement of policy,[32] since the FCC must grant a hearing before denying a license.[33] But past experience proves that an indication of policy often has a prophylactic effect.[34]

With or without a rule, however, effective enforcement of the policy will depend on regular scrutiny of the non-competitive aspects of cross-channel ownership in all licensing hearings. Depending on the status of the news-

for measurement of license applicant qualifications has been recognized. Heitmeyer v. FCC, 95 F.2d 91, 98 (D.C. Cir. 1937). *Administrative Procedure in Government Agencies*, SEN. Doc. 8, 77th Cong., 1st Sess. 27 (1941). The rule-making power has broad limits because the intent of Congress was to grant the Commission "expansive powers." National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943).

32. Compare the Chain Broadcasting Regulations upheld in the *NBC* case. National Broadcasting Co. v. United States, 319 U.S. 190 (1943). Justice Frankfurter, who had dissented in the *CBS* case, Columbia Broadcasting Co. v. United States, 316 U.S. 407, 429 (1942), from the majority holding that the Regulations, 47 CODE FED. REGS. § 3.101–3.108 (1949), automatically denied a license to any station acting in derogation of their command, restated his original view. "[The regulations] are merely an announcement to the public of what the Commission intends to do in passing upon future applicants for license. . . . No announcement of general licensing policy can relieve the Commission of its statutory obligation to examine each application for a license." *Id.* at 431.

If the order is no more than a general statement of policy, it may not be subject to prior judicial review. Urgent Deficiencies Act, 38 STAT. 219, 220 as incorporated and extended by Communications Act § 402(b). Where the order sought to be reviewed does not of itself adversely affect complainant, but will only affect him if the agency uses it as a basis for action against him, resort to the courts is either premature or wholly beyond their province. Rochester Telephone Co. v. United States, 307 U.S. 125, 130 (1939). But see Columbia Broadcasting Co. v. United States, 316 U.S. 407, 416 (1942).

These requirements will make it virtually impossible to secure review before the Commission acts on an application for renewal since the FCC has refused to issue declaratory judgments under the power granted it by § 5(d) of the Administrative Procedure Act, 60 STAT. 239, 5 U.S.C. § 1004(d) (1946). See Cross-out Advertising Co., 5 PIKE & FISCHER RADIO REG. 464 (1949).

The promulgation of rules would not only serve as an indication of the Commission's stand on the matter, but would also allow the industry a chance to present its side of the controversy. The right of interested persons to adequate notice and hearing is guaranteed in rule-making proceedings. Administrative Procedure Act § 4, 60 STAT. 237, 5 U.S.C. § 1001(d) (1946). These rights only apply to "substantive rules, which invoke true administrative legislation." SEN. Doc. No. 248, 79th Cong., 2d Sess. 19 (1946). In all probability, the proposed rule would bear a substantive tag. Nathanson, *Some Comments on the Administrative Procedure Act*, 41 ILL. L. REV. 368, 382 (1946).

33. Communications Act § 309(a). This section not only gives the Commission authority to grant licenses without a hearing, but it also enables a license applicant to request a hearing as of right before his license is denied. Ashbacker Radio Co. v. FCC, 326 U.S. 327 (1945).

34. Licensees have always been extremely jittery when dealing with the Commission. In the back of their minds is the omnipresent threat of license revocation. Accordingly, rules and even informal utterances by the FCC or its individual members have often been followed instantly by conformance to the new pattern. See Comment, *Administrative Enforcement of the Lottery Broadcast Provision*, 58 YALE L. J. 1093, 1110 (1949). But compare the action of the industry when faced with the Chain Broadcasting Regulations. WHITE, THE AMERICAN RADIO 162 (1947).

paper applicant, the power may be exercised through original denial of a license, or through revocation or refusal to renew. Depending on the case, withholding of a license may be based on one of three grounds. First, monopolistic practices engaged in by the applicant in the past may be chalked up as a poor character qualification.[35] Second, the Commission may find that cross-channel ownership has violated or is likely to violate the antitrust prohibition against monopoly power. Third, the Commission may find that such ownership, while not violating antitrust law, is nevertheless inconsistent with the "public interest" in getting as much diversity as is possible.[36]

In some cases, joint ownership of a newspaper and radio station will not be contrary to the public interest. Small communities, where the need to promote diversity may be the greatest, often possess insufficient resources to support competing information outlets.[37] Enforcing competition here, without regard to economic consequences, might only destroy one or both media.[38] And perhaps in some large cities sources of information may be so numerous that the effect of occasional cross-channel ownership may be inconsequential.

A thorough but flexible application of the *Mansfield* doctrine would contribute substantially to the public's interest in widely diversified control over the instruments of mass communication.[39]

HOWARD N. GILBERT†

35. Communications Act § 308(b). See note 20 *supra*. Compare Mester v. United States, 70 F. Supp. 118 (E.D.N.Y. 1947), *aff'd per curiam*, 332 U.S. 749 (1947) (denial of application for transfer of station franchise based in part on prospective transferee's record of federal regulatory law violations). Compare also Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942). Here, the Court set aside an NLRB order issued without Board consideration of a relevant criminal statute. ". . . [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so singlemindedly that it may wholly ignore other and equally important Congressional objectives. Frequently, the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Id.* at 47.

36. If the Commission is to carry out the program contemplated herein, it should have some means at its command to allow the licensee a period of grace before the franchise is discontinued. Issuance of a cease and desist order would enable the licensee to secure a purchaser before final proceedings to cancel the license were instituted. The FCC has requested Congress to provide it with the power to issue cease and desist orders. See *Hearings Before Committee on Interstate and Foreign Commerce on H. R. 1973 § 312(b)*, 81st Cong., 1st Sess. 20 (1949).

37. See Report of the U.S. Senate, Special Committee to Study Problems of American Small Business, Survival of a Free Competitive Press, The Small Newspaper, U.S. Senate, 79th Cong., 1st Sess. (1947); FCC, AN ECONOMIC STUDY OF STANDARD BROADCASTING, esp. 59–97 (1947).

38. See CHAFEE, 2 GOVERNMENT AND MASS COMMUNICATIONS 660, 662 (1947).

39. While the Commission is capable of carrying out a program to eliminate cross-channel ownership it may be worthwhile to determine if Congress will support such action. Congressmen are particularly sensitive about any inroads on the broadcaster's privileges, for

ATTACHMENT B

Résumés of Adams Communications Corporation Principals
Robert L. Haag, Wayne J. Fickinger, Manfred Steinfeld,
Howard N. Gilbert, and A.R. Umans

BIOGRAPHY

Robert L. Haag
4545 W. Touhy Avenue
Lincolnwood, Illinois 60712

- President of
  - Monroe Communication: 1981 – 1992
  - The Monroe Group, Inc.
  - Adams Communication

- Chairman of the Board of
  - Mercury Products Corp.

- Business Directorships
  - Alberto-Culver – toiletries & food
  - Midas International – mufflers
  - Shelby-Williams – furniture
  - Fine Arts Broadcasting – radio
  - Banner Press – publishing
  - California Dreamers – greeting cards
  - Albany Park Bank and Trust
  - G&W Electric

- Real Estate
  - Developed shopping centers: Naperville and Northbrook, IL
  - A general partner in the development of
    Marriott-Michigan Ave., Chicago, IL
    Lakehurst Mall, Waukegan, IL

- New Business Directorship
  - Skokie Valley Hospital
  - Jewish Community Centers
  - American-Israel Chamber of Commerce
    (Man of the Year 1976, President 1977-1978)

- Office Address
  The Monroe Group, Inc.
  400 Skokie Blvd., Suite 400
  Northbrook, IL 60062

- Personal
  - Born: Brooklyn, New York - 1926
  - U.S. Army Air Corps: 1945 – 1946
  - Graduated New York University – 1950
  - Co-founder of Alberto-Culver Company

WAYNE J. FICKINGER
1244 Forest Glen Drive South
Winnetka, Illinois 60093
847-446-7287

Personal

Born: June 23, 1926 Belleville, Illinois

Marital Status: Married; five children

Education: (1949) Bachelor of Science Degree (Communications)
University of Illinois
(1950) Master of Science Degree (Communications)
Northwestern University

Honorary Academic Societies

- Sigma Delta Chi, National Editorial Fraternity
- Alpha Delta Sigma, National Advertising Fraternity
- Director, James Loebb Young Fund
  University of Illinois

Employment Record

1951-1950: United Press Wire Source
Role: Reporter, Overnight Editor

1952-1951: Sears, Roebuck & Company
Role: Advertising Copywriter

1954-1953: Calkins & Holden Advertising Agency
Roles: Field Merchandiser
Account Executive

19821963: J. Walter Thompson Advertising Agency
(Chicago, New York)

1965-1963: Role – Account Executive

1967-1965: Role – Vice President, Account Supervisor

1971-1967: Role – Senior Vice President, Management Supervisor

1973-1971: Role – Executive Vice President, Director of Client Service/Chicago, IL

1975-1973: Role – Executive Vice President, Managing Director/Chicago
Elected Corporate Director

1977-1975: Role – Executive Vice President/Western Division
(Chicago, San Francisco, Los Angeles, Honolulu)

1978-1977: Role – President, Chief Operating Officer, North America
(Supervising six U.S. Offices; three Canadian)

1982-1979: Roles:- President (world-wide) Chief Operating Officer

- Director (continuing) 1973-1982
- Chairman, Operations Committee
- Member, Compensation Committee
- Member, Retirement Trust Committee

Concurrently: (1980) President, JWT Group Inc.
(1980-1982) Board of Directors, JWT Group
Member; Group Corporate Committee
Member; Group Executive Committee

1983-1982: Spencer-Stuart & Associates (Chicago), Executive Recruiting
Role: Managing Director

1989-1984: Bozell, Inc.; Bozell, Jacobs, Kenyon & Eckhardt
Role: Vice-Chairman, Director

1993-1989: Mid America Committee (Chicago Speaker Organization, founded by U.S. State Department)
Role: President

Present – 1994:

Director and/or Advisory Boards Activity

- Evalucom/Phase one (Advertising Testing)
  Roles: Director, Vice Chairman

- Monroe Communications
  Roles: Director, Executive Vice President

- Frankel & Company (Merchandising Agency)
  Role: Director (Advisory Board)

- Sullivan & Prodbst (Fertilizer Manufacturer, Marketer)
  Role: Director (Advisory Board)

- The Alford Group (Philanthropic Counsel)
  Role: Director (Advisory Board)

- Adams Communications
  Role: Vice President

- Who's Who In Business and Finance
  Role: Advisory Board

Civic Activities

- Chicago Convention and Tourist & Bureau
  Role: Director; Committee Chairman
- Mayor's Committee on Tourism
  Role: Member
- Mundelein College (Women's College)
  Role: Director, Vice Chairman
- Columbia College
  Role: Director

Philanthropic Activities

- National Mental Health Fund Raiser
  Received Meritorious Award
- United Ceberal Palsy Fund Raiser
  Role: Committeeman
- American Red Cross
  Received five year meritorious service award
- March of Dimes Gourmet Dinner (fund raiser)
  Role: Chairman
- El Valor (Hispanic Educational Fund Raising/Teaching Organization)
  Role: Member, Steering Committee

Other Activities:

- Commodore Club (Retired Directors of J. Walter Thompson)
- Ex-moor County Club
- Mid America Club

Military History

- U.S. Naval Reserve/Active Duty
  1944-1946; Honorable Discharge Signalman Third Class.
- U,S. Naval Reserve/ Inactive
  1946-1950; Honorable Discharge